Who is an ERISA Fiduciary?

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How does ERISA define who is a fiduciary?

I. <u>3(21) Fiduciary:</u> (Named Fiduciary)

ERISA Section 3(21) (A) provides that a person is a fiduciary with respect to an employee benefit plan to the extent that such a person does any of the following:

1. Exercises any discretionary authority or control over the management of a plan, or over the management or disposition of plan assets [ERISA § 3(21) (A) (i)];

2. Renders investment advice for a fee or other compensation, direct or indirect, over the disposition of plan assets, or has any authority or responsibility to do so [ERISA § 3(21) (A) (ii)]; or

3. Has any discretionary authority or discretionary responsibility in the administration of such plan [ERISA § 3(21) (A) (iii)].

"The statute defines a 'fiduciary' as a person who exercises authority or discretion over the administration of a plan, but only when performing those functions listed above"

ERISA Section 402(a) states that every plan must have at least one (1) named fiduciary who can appoint an investment manager.

II. <u>3(38) Fiduciary:</u> (Investment Manager)

ERISA section 3(38) defines the "Investment Manager" as a fiduciary with full discretionary powers for selecting, monitoring and replacing the investment options in the plan. When appointed by an authorized fiduciary, the 3(38) takes an ascendant role over the trustee. The trustee then becomes "directed" by the ERISA section 3(38) Investment Manager. The 3(38) fiduciary is appointed and monitored by the 3(21) fiduciary.

1) The 3(38) may hire and monitor other service providers relevant to its scope of responsibility. They will monitor fund managers (and replace them if prudent to do so), custodians and others. It has the powers and the duty to replace such service providers as it deems necessary and appropriate in its sole discretion.

2) The 3(38) must also ensure that the objectives of the plan's portfolios are being met, with all the attendant responsibilities associated therewith.

III. <u>3(16) Fiduciary:</u> (Plan Administrator)

ERISA Section 3(16) defines the Plan Administrator of the plan. The Plan Administrator should not be confused with a "Pension Administrator" or a "Third Party Administrator".

The Plan Administrator has the following primary responsibilities:

- Ensures all filings with the federal government (form 5500, etc.) are timely made;
- Makes important disclosures to plan participants;
- Hires plan service providers if no other fiduciary has that responsibility; and
- Fulfills other responsibilities as set forth in plan document.

ERISA sections 101, 102, and 103 describe the specific fiduciary responsibilities and duties of the Plan Administrator. The plan sponsor will normally reserve these functions of the Plan Administrator. But a plan sponsor may appoint an independent fiduciary to serve as the ERISA section 3(16) Plan Administrator.

II. What are the general duties of Fiduciary and other "Standards of Conduct"

Under ERISA Section 404, a fiduciary provides the following basic duties and responsibilities:

1. Duty of Loyalty

- Act solely in the interest of plan participants and their beneficiaries;
- Act for the exclusive purpose of providing benefits to plan participants and their beneficiaries and defraying reasonable expenses of administering the plan;
- May not take actions to benefit his or her own account to detriment of plan participants

2. Duty of Prudence

- Exercise the same care, skill, prudence and diligence that a prudent person acting in a like capacity and familiar with such matters would exercise in the conduct of an enterprise of a like character and with like aims;

3. Duty of Diversification

- If the fiduciary is involved in investing plan assets, diversify plan investments so as to minimize the risk of large losses (unless it is clearly prudent not to do so under the circumstances); and
- Monitor the investments.

4. Duty to follow Plan Document

- Act in accordance with the documents and instruments governing the plan (insofar as the documents and instruments are consistent with ERISA).

Does ERISA include any other standards of conduct governing fiduciaries?

- Bonding: Every fiduciary who handles funds or other property of the plan has to be bonded.
- If a fiduciary does not have sufficient knowledge to evaluate, must go to expert advisor. Must acquire enough information to make a well-informed decision.
- ERISA describes certain transactions that are deemed per se prohibited if a fiduciary causes the plan to engage in any one of those transactions with a party in interest. [ERISA § 406] The enumerated transactions include:
  - The sale or exchange of property between the plan and a party in interest;
  - The sale of employer stock between the company and the plan; and
  - Payment of fees to service providers that are parties in interest and others.
- ERISA Section 406 also forbids fiduciary self-dealing.

III. Definitions of Fiduciaries

Named Fiduciary 3(21) Fiduciary
One who is authorized in the plan document to control the operation and administration of the plan. A named fiduciary can be a person or group of people who are actually named in the plan document or who can be identified by a procedure described in the plan document (see next page).

Plan Sponsor (Employer)
The entity that establishes an employee benefit plan — usually an employer, an employee organization, or both.

Plan Administrator 3(16) Fiduciary
The person or entity responsible for administering a pension plan. The plan document may designate a plan administrator by name or may describe a procedure for appointing that person(s) or committee. If an administrator is not appointed, the plan sponsor (employer) is the plan administrator. The plan administrator is not a third-party administrator who performs administrator functions for the plan and lacks discretionary authority. Instead, the plan administrator has responsibility and authority for administering the plan.

Trustee
An entity or person who holds title to assets in trust for the benefit of participants. Trustees have exclusive authority and discretion to manage and control plan assets; however, this authority and discretion is limited to the extent that the plan states that the trustees are subject to the direction of participants or of a named fiduciary who is not a trustee, or the authority to manage, acquire or dispose of plan assets is delegated to one or more investment managers.

Investment Manager 3(38) Fiduciary
Under ERISA, an investment manager is a fiduciary who:

1) Exercises discretionary authority or control in the management of the plan or exercises any authority or control over the management or disposition of the plan assets;
2) Renders investment advice for a fee or other compensation (direct or indirect) for any assets of the plan, or has any authority or responsibility to do so; or
3) Has discretionary authority or discretionary responsibility in the administration of the plan.

Who is not a plan fiduciary?

In the day-to-day administration of a retirement plan, some individuals are responsible for performing administrative functions that do not require discretionary decisions or the provision of investment advice. Individuals who perform administrative functions for the plan but who cannot make decisions about plan assets, policies or interpretations are not fiduciaries.

The following are examples of administrative functions that are not considered fiduciary activities:

- Applying rules to determine eligibility for participation or benefits
- Preparing employee communication materials
- Calculating benefits according to the rules in the plan document
- Receiving contributions and applying them as provided in the plan

Section 9.10 of Corbel Plan Document

9.9 ACTION BY THE EMPLOYER

Whenever the Employer under the terms of the Plan is permitted or required to do or perform any act or matter or thing, it shall be done and performed by a person duly authorized by its legally constituted authority.

9.10 NAMED FIDUCIARIES AND ALLOCATION OF RESPONSIBILITY

The named Fiduciaries of this Plan are (1) the Employer, (2) the Administrator, (3) any discretionary Trustee, and (4) any Investment Manager appointed hereunder. The Employer may, however, modify the preceding sentence to add or remove named Fiduciaries. The named Fiduciaries shall have only those specific powers, duties, responsibilities, and obligations as are specifically given them under the Plan including, but not limited to, any agreement allocating or delegating their responsibilities, the terms of which are incorporated herein by reference. In general, the **Employer** shall have the sole responsibility for making the contributions provided for under the Plan; and shall have the authority to appoint and remove the Trustee and the Administrator; to formulate the Plan's funding policy and method; and to amend or terminate, in whole or in part, the Plan. The **Administrator** shall have the sole responsibility for the administration of the Plan, including, but not limited to, the items specified in Article II of the Plan, as the same may be allocated or delegated thereunder. The Administrator shall act as the named Fiduciary responsible for communicating with the Participant according to the Participant Direction Procedures. If the **Trustee** has discretionary authority, it shall have the sole responsibility of management of the assets held under the Trust, except to the extent directed pursuant to Article II or with respect to those assets, the management of which has been assigned to an **Investment Manager**, who shall be solely responsible for the management of the assets assigned to it, all as specifically provided in the Plan. Each named Fiduciary warrants that any directions given, information famished, or action taken by it shall be in accordance with the provisions of the Plan, authorizing or providing for such direction, information or action. Furthermore, each named Fiduciary may rely upon any such direction, information or action of another named Fiduciary as being proper under the Plan, and is not required under the Plan to inquire into the propriety of any such direction, information or action. It is intended under the Plan that each named Fiduciary shall be responsible for the proper exercise of its own powers, duties, responsibilities and obligations under the Plan as specified or allocated herein. No named Fiduciary shall guarantee the Trust Fund in any manner against investment loss or depreciation in asset value. Any person or group may serve in more than one Fiduciary capacity.

9.11 APPROVAL BY INTERNAL REVENUE SERVICE

Notwithstanding anything herein to the contrary, if, pursuant to an application for qualification filed by or on behalf of the Plan by the time prescribed by law for filing the Employer's return for the taxable year in which the Plan is adopted, or such later date that the Secretary of the Treasury may prescribe, the Commissioner of Internal Revenue Service or the Commissioner's delegate should determine that the Plan does not initially qualify as a tax-exempt plan under Code §§401 and 501, and such determination is not contested, or if contested, is finally upheld, then if the Plan is a new plan, it shall be void ab initio and all amounts contributed to the Plan by the Employer, less expenses paid, shall be returned within one (1) year after the date the initial qualification is denied, and the Plan shall terminate, and the Trustee shall be discharged from all further obligations. If the disqualification relates to an amended plan, then the Plan shall operate as if it had not been amended.

IV. Named Fiduciaries: Responsibilities and Actions

Plan Sponsor (Employer)

- Acts to appoint other plan fiduciaries (see Section 2.1 of Corbel Plan Document)(Attachment #1)
- Delegating responsibility to or allocating duties among plan fiduciaries
- Monitor their performance periodically
- "Settlor" category functions i.e., plan establishment, amendment or termination are not fiduciary in nature
- Remit plan contributions timely

Actions

- Meet with various fiduciaries on periodic basis and document process
- Use due diligence filing checklist and fiduciary meeting checklist

Plan Administrator

- Responsible for administration of the plan (see Section 2.4 of Corbel Plan Document)(Attachment #1)
- Typically is the employer or an officer of the employer
- Hires TPA "Third Party Administrator" (not a fiduciary) to assist in administration

Actions

- Meets with other fiduciaries and reviews the appropriate section of the two checklists

Trustee

- Responsible for management and control of plan assets, subject to the direction of the plan participant (see Section 5.1 of Corbel Trust Document and Section 4.12 of Corbel Plan Document)(Attachment #2)

Actions

- Meets with other fiduciaries and reviews the appropriate section of the two checklists
- Develop an Investment Policy Statement "IPS"

Investment Manager

- Responsible for management of plan assets (see section 9.10 of Corbel Plan Document)

Actions

- 404(c) and participant direction (see section 2.4(l) (Attachment #1)
- Election Form for Self Directed Brokerage Account (See Attachment)

Fiduciary Meeting Checklist

This Plan Fiduciary Meeting Checklist provides specific topics that can be built into an agenda for such a meeting

This checklist can also be a source for action items that need to be addressed

- **Read minutes from previous plan fiduciary meeting and provide approval.**

- **Review plan investments (Investment Policy Statement)**

- **Conduct a plan review:**
  - Review recent changes in the law that may affect the plan since the last review
  - Review Internal Revenue Service, Department of Labor or other governmental agency regulations or proposals that may affect the plan
  - Consider potential changes in plan design
  - Review recent plan amendments

- **Review participant education and communication:**
  - Review the results of any enrollment meetings held since the last review and discuss changes for future meetings
    - Schedule the next enrollment meeting
  - Review the results of any participant educational meetings held since the last review and discuss changes for future meetings
    - Schedule the next participant education meeting

- **Review the plan operations**
  - Review service providers' performance against plan needs and service provider agreements, including a review of fees and expenses
  - Ensure that plan contributions are being segregated and invested into the plan as soon as possible
  - Ensure that the plan continues to qualify for relief under ERISA 404(c), if applicable

- **Review any miscellaneous items or issues**

- **Finalize changes and/or assignments to document in the meeting minutes for review and approval in the next meeting.**

Named Fiduciaries: Responsibilities and Actions

Due Diligence Filing Checklist

Plan fiduciaries must carefully document the processes they have followed in fulfilling their duties. A complete and detailed due diligence file will help illustrate the prudent steps you have taken in fulfilling your fiduciary responsibilities.

The following due diligence file checklist will assist you not only in selecting and monitoring service providers, but will also assist you with the ongoing task of monitoring the plan investments, operation, and administration.

Plan Records

- Plan and Trust Documents
  - Plan and Trust Documents, including amendments
  - Summary Plan Description, including updates, and record of participant receipt
  - IRS Determination Letter

- Employee Communications & Education
  - ERISA 404(c) communications
  - Correspondence announcing the plan
  - Pre-enrollment and enrollment communications
  - Summary Annual Report (SAR)

- Filings
  - Form 5500
  - Auditors' statements, if applicable

Selection of Investment and Service Providers

- Provider selection criteria and comparisons
  - Request for Proposal and/or other documentation of provider search and requirements
  - Documentation of criteria used for selection of provider, including provider proposal materials, consultant reports, references, etc.
  - Cost comparison (e.g., Department of Labor fee worksheet)

- Service Provider Agreements and Insurance
  - Investment provider and Third Party Pension Administrator (TPA) agreements and any updates or amendments
  - Proof of insurance supplied by service providers
  - Fidelity Bonds to comply with ERISA Section 412, if applicable

- Selection of Investments Options
  - Investment Policy Statement
  - Documentation used to select investment options (e.g., Investment Profiles, performance summary, and other information gathered for investment analysis)

Ongoing Monitoring

- Insurance Policies and Bonds
  - Fidelity bonds to comply with ERISA Section 412
  - Fiduciary liability and directors & officers policies, if applicable
  - Proof of insurance by service providers

- Employee Communications & Education
  - Documentation of new participants' receipt of plan communications (e.g, SPD and other required communications.
  - Notification to participants regarding plan changes

- Investment Monitoring
  - Documentation of periodic investment review including any updates to the Investment Policy Statement or investment monitoring criteria
  - Updated investment information provided by investment provider, including fund performance and expense information (Investment Profiles, performance summaries)
  - Other information gathered for analysis of plan investments

- Plan Administration
  - Records of annual plan administration provided by the TPA

- Additional Monitoring
  - Documentation of service provider's performance against plan needs
  - Minutes of any plan fiduciary meetings

V. Summary

- Document your "process" and have scheduled regular meetings
    - Follow "Fiduciary Meeting Checklist" and "Due Diligence Checklist"
    - Finalize "IPS" and Election of Self-Directed Brokerage Account

- Can purchase additional liability insurance
    - ERISA permits the purchase of fiduciary liability insurance. If the insurance is purchased with plan assets, the insurance policy must permit recourse by the insurer against the fiduciary. Recourse allows the insurer to try to collect from the fiduciary if a breach is determined to have occurred. A nonrecourse rider is a supplemental insurance policy that may be available which eliminates the insurer's right of recourse. A nonrecourse rider costs extra and may not be paid with plan assets
    - Directors & Officers Insurance – your company's directors and officers insurance may or may not cover fiduciary breaches. Check the insurance policy, because many policies specifically exclude ERISA plans.
    - Errors & Omissions Insurance- "E&O" insurance protects against liability for administrative errors and omissions. This insurance typically covers third-party administrators, accountants and attorneys.

- Department of Labor and the IRS has jurisdiction in this area

- Two most common examples of Fiduciary Violation:
    - Failure to submit deferrals on a timely basis
    - Poor investment selection and monitoring process

VI. Disclaimer

This information is of a general and informational nature and IS **NOT INTENDED TO CONSTITUTE LEGAL OR TAX ADVICE**. Rather, it is provided as a means to inform you of current information about legislative, regulatory changes, and other information of interest. The information is based on current interpretations of the law and is not guaranteed. Neither the company nor its representatives give legal or tax advice. Please consult your attorney or tax advisor for answers to specific questions.

VII. Attachments